

STATE OF MICHIGAN
COURT OF APPEALS

In re CHAD ALBERT LOWE, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

CHAD ALBERT LOWE,

Respondent-Appellant.

UNPUBLISHED

July 5, 2002

No. 230402

Oakland Circuit Court

LC No. 99-626804-DL

Before: Hood, P.J., and Saad and E. M. Thomas*, JJ.

PER CURIAM.

Respondent was adjudicated responsible for possession of marijuana, MCL 333.7403(2)(d), and assault and battery, MCL 750.81, and placed in the supervised custody of his parents. He appeals as of right from the adjudication of the assault and battery charge. We affirm.

Respondent first challenges the sufficiency of the evidence. In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and, viewing the evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997). All conflicts in the evidence are to be resolved in favor of the prosecution. *People v Parshall Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

“A simple assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery.” *People v Adrian Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996). “A battery is the wilful and harmful or offensive touching of another person which results from an act intended to cause such a contact.” *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991). In other words, an assault

* Circuit judge, sitting on the Court of Appeals by assignment.

and battery is a consummated assault. *People v Solak*, 146 Mich App 659, 670; 382 NW2d 495 (1985). The evidence showed that respondent deliberately grabbed a fellow student by the neck and began choking her. Such evidence, if believed, was sufficient to prove the crime charged beyond a reasonable doubt. *Id.*

Respondent next contends that he was denied a fair trial due to prosecutorial misconduct. The issue has not been preserved because respondent did not object at trial. Therefore, review is precluded unless respondent establishes plain error that affected the outcome of the trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Claims of prosecutorial misconduct are decided on a case-by-case basis. This Court examines the record and evaluates the alleged improper remarks in context to determine whether the respondent was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

The prosecutor improperly commented on possible disposition should respondent be adjudicated responsible. *People v Szczytko*, 390 Mich 278, 289; 212 NW2d 211 (1973) (Brennan, J.); *People v Torres (On Rehearing)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). However, the error does not necessitate reversal where, as here, the prosecutor was responding to the defense counsel's argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). In addition, the court properly instructed the jury that the lawyers' arguments were not evidence and that possible penalties should not influence its decision because that matter rested with the court. Those instructions were sufficient to dispel any prejudice that might have resulted from the prosecutor's remark. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Given that plus the unrebutted evidence that respondent intentionally choked the victim, respondent has not shown that the error affected the outcome of the trial.

Respondent lastly contends that trial counsel was ineffective because she failed to object to the prosecutor's improper remarks about possible disposition upon a guilty verdict. Because respondent failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Given that the prosecutor's remarks were improper, defense counsel was ineffective for failing to object. However, in light of the unrebutted testimony that respondent did commit an assault and battery and given the court's instructions to the jury, he has not shown a reasonable likelihood of acquittal had counsel interposed an appropriate and timely objection. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001).

Affirmed.

/s/ Harold Hood
/s/ Henry William Saad
/s/ Edward M. Thomas